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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-1287

JOHN JACK STEWART,

Petitioner,

-vs-

SUPERIOR COURT, PIMA COUNTY, ARIZONA, and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS THE PLEA VOLUNTARILY ENTERED, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI? AS A SUB-ISSUE, SHOULD THERE HAVE BEEN AN EVIDENTIARY HEARING ON THE ISSUE OF VOLUNTARINESS?

II. WAS THE SENTENCE CRUEL AND UNUSUAL, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

III. DID THE PROSECUTOR ARBITRARILY AND DISCRIMINATORILY SELECT THE CHARGE AGAINST PETITIONER, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI? AS A SUB-ISSUE, SHOULD THERE HAVE BEEN AN EVIDENTIARY HEARING ON THE ISSUE OF ALLEGED PROSECUTORIAL VINDICTIVENESS?

IV. WAS PETITIONER PROSECUTED UNDER A VAGUE STATUTE, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

STATEMENT OF THE CASE

Respondents must reject petitioner's selective factual presentation and rely instead upon the Federal District Court's "Findings of Fact." Compare Petition for a Writ of Certiorari, at 19-21, with id., at 3-7. While petitioner's selectivity

presents a somewhat different factual context than that presented by the Federal District Court's factual findings, petitioner makes no effort to dispute the Federal District Court's factual presentation. As such, respondents accept the Federal District Court's findings of fact as the factual background against which the petition is to be evaluated. Respondents make no effort to present their own selective factual context.

The Federal Circuit Court's findings of facts are not relied upon for a couple of reasons. First, they are rather sparse. (See Petition for a Writ of Certiorari, at 17-18.) Second, they contain some amazing verbiage. While the Federal Circuit Court found that "appellant approached at least three elderly women," "persuaded each of them to

employ him" for roof repair, and "charged them unconscionably excessive amounts" ("there was overpersuasion resulting in a grossly inequitable charge without any real meeting of the minds"), the Court also stated that "the evidence does not establish that there was a scheme to deceive." (See Petition for a Writ of Certiorari, at 17.) Clearly, this last statement is out of step with the rest of the Federal Circuit Court's Memorandum Decision. As might be expected, petitioner seizes upon this strange verbiage no less than four times. (See Petition for a Writ of Certiorari, at 9, 10, 10, 12.) Respondents can only suggest that the word "not" was mistakenly included in the written decision. Even petitioner acknowledges the inherent "conflict." (See Petition for a Writ of Certiorari, at 9.)

ARGUMENT

I

THE PLEA WAS VOLUNTARILY ENTERED. THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI. THERE SHOULD NOT HAVE BEEN AN EVIDENTIARY HEARING.

The decisions of the Federal Circuit Court, the Federal District Court, and the Arizona Court of Appeals comport with all decisions from this Court interpreting the constitutional rights of persons accused of crime, under the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner suffered no cruel and unusual punishment; he was not denied due process of law. Thus, none of the issues presented by the instant writ warrant a grant of certiorari. This introductory paragraph is intended, by incorporation by reference, to precede each of the following three arguments.

Petitioner's first contention appears to be that "his plea was involuntary" because it was entered without his "understanding that his conduct did not fall within the parameters of the statute under which he was charged." (See Petition for Writ of Certiorari, at 9.) Respondents submit that this contention is totally without merit.

The manner in which petitioner focuses this first contention requires some prefatory discussion. Petitioner claims that his conduct did not constitute the crime charged and pled to. According to petitioner, the failure to realize this at the time of the entry of the plea renders the plea involuntarily entered. While petitioner does not specifically contend that there is a lack of a factual basis for the plea, it seems apparent that he is

indirectly claiming that there is no factual basis.

It is respondents' position that the existence of a factual basis for the charge and plea establishes the fact that petitioner's conduct falls within the crime charged and pled to. That is, if petitioner understood the nature of the charge against him, and if he knew what his conduct was (this portion must be conceded), then he knew that the two (the charge and the conduct) coincided. When the two coincide, there is a factual basis -- when the elements of the crime charged equal the elements of conduct, a factual basis is manifest. Since the record shows an understanding of the charge, petitioner knew his conduct fell within the charge.

The relevant portion of the change of plea hearing is set out in the Petition

for a Writ of Certiorari, at 4. This portion of the plea hearing includes a reading of the charge from the information and a series of questions to which petitioner responded in the affirmative. Thus, petitioner told the trial court that he knowingly made false or misleading representations to the victim with the intent to obtain money or property and to keep the proceeds gained through the misrepresentations. Parenthetically, in addition to the mispresentations concerning the product's capabilities, petitioner's own factual presentation indicates that he would do work without permission, and that he would extract as much payment as he could. (See Petition for a Writ of Certiorari, at 4-5.)

It is to be noted that the trial court and the Federal Circuit Court found a

factual basis for the guilty plea based upon these affirmative replies. (See Petition for a Writ of Certiorari, at 4, 18.) Since there was no claim of innocence or ignorance (petitioner displayed no lack of understanding the charge because he understood it), there was no need for the trial court to go into a more detailed inquiry. Contrary to petitioner's assertion, the trial court's inquiry was not too simplistic; it was just complex enough.

In finding a factual basis and a corresponding understanding of the charge, the Federal Circuit Court relied upon the statutory language (as set forth in the information) and the unambiguous language of the trial court in spelling out the elements of the charge at the plea hearing. The information used the

relevant statutory language. Additionally, petitioner's trial counsel fully discussed the entry of the plea with petitioner. Thus, petitioner received fair notice of the charge; he fully understood the nature of the charge against him.

Since petitioner knew what the charge was, and since he knew what his conduct entailed, there can be no valid claim that he did not realize that his conduct did not fall within the charge, especially when it clearly did. Contrary to petitioner's claims, there was a scheme (misrepresentations regarding the product's capabilities were directed at elderly females), the victims had ordinary prudence and comprehension (though they knew they were cheated after the work was completed, they, understandably, felt somewhat constrained to pay for the

services that were not agreed upon but were rendered), and petitioner was a person of ordinary intelligence (while the Federal District Court assumed petitioner was a person of ordinary intelligence, and while petitioner apparently takes issue with that assumption, respondents posit that the scheme displayed by the record, in which petitioner extracted as much payment as possible, conclusively shows that petitioner was at least of ordinary intelligence).

There is no reason to grant certiorari on the basis of this first argument; there was no miscarriage of justice. Nor is there a reason to grant certiorari on the sub-issue raised in petitioner's first argument.

As a sub-issue, petitioner also contends that the Federal District Court

erred by not conducting an evidentiary hearing on the issue of voluntariness of the plea. This contention is premised upon petitioner's belief that an evidentiary hearing was needed to show this alleged fact: that he really did not understand the nature of the charge against him. Respondents submit that no evidentiary hearing was required where the record showed that a factual basis was clearly presented to the trial court. (See Petition for a Writ of Certiorari, at 18.)

The Federal District Court indicated that an evidentiary hearing was not required because there was no claim of coercion or duress. (See Petition for a Writ of Certiorari, at 22.) Oddly enough, the Federal District Court and petitioner rely upon the same case for rather opposing conclusions.

That case is Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975), and it indicates that certain situations (an allegation of a plea bargain or an allegation of necessary but untruthful plea litany responses regarding sentencing promises) may require an evidentiary hearing. This is entirely understandable because, where there is a claim of involuntariness bottomed upon promise, coercion, or duress, there will be two sides to the story. That is, the pleader's claim may be tested against the testimony of other witnesses. In the instant case, petitioner's subjective claim of a lack of understanding (a claim that could always be made) cannot be rebutted at an evidentiary hearing. In such cases, an evidentiary hearing is not required (the pleader could always give

testimony backing up the subjective claim), and the change of plea testimony is allowed to speak for itself. See Clayton v. Estelle, 541 F.2d 486 (5th Cir. 1976), wherein the self-serving allegations of coercion unsupported by any other credible evidence are deemed insufficient to require an evidentiary hearing where the plea hearing on its face shows there was no coercion. If no hearing is required in a case where there is alleged coercion, then there is no need for a hearing in the instant case.

ARGUMENT

II

THE SENTENCE WAS NOT CRUEL NOR UNUSUAL. THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

Petitioner claims that the Federal Circuit Court used the wrong test in holding that "the sentence imposed does

not shock the conscious [sic] and is therefore constitutional." (Petition for a Writ of Certiorari, at 11.) Respondents submit that the test used is the substantial equivalent of the test petitioner seeks.

Pursuant to his desired test, petitioner contends that his sentence makes no measurable contribution to accepted goals of punishment and is grossly out of proportion to the severity of the crime pled to. If these contentions are correct, then the sentence shocks the conscience. However, it is respondents' position that, under an objective view, both of petitioner's contentions are without merit.

Accepted goals of punishment include rehabilitation, restraint, retribution, and deterrence. Each is or may be

realized by the 5 to 10 year prison term meted out. Perhaps, the incarceration will rehabilitate petitioner. Certainly, society will be protected during the period of incarceration -- petitioner will be restrained from preying upon elderly female victims during his incarceration. Those who have already fallen victim to petitioner's scheme may delight in the retribution. Perhaps, petitioner will be deterred from future schemes. Finally, other potential schemers may be deterred due to petitioner's example. Thus, the sentence makes a reasonable contribution to accepted goals of punishment; the conscience is not shocked.

While petitioner may view his schemes as insignificant, respondents posit that the crime pled to was a most serious and reprehensible one. To defraud the

vulnerable of what may very well be their life savings should not be viewed so lightly. The sentence is not grossly out of proportion to the severity of the crime pled to; the conscience is not shocked by the sentence, but by the conduct.

Parenthetically, it matters not that less severe charges were available, or that the punishment for the instant charge has been recently reduced by new legislation. The sentence meted out did not amount to cruel and unusual punishment. There remains no reason to grant certiorari.

ARGUMENT

III

THE PROSECUTOR DID NOT ARBITRARILY AND DISCRIMINATORILY SELECT THE CHARGE. THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI. THERE SHOULD NOT HAVE BEEN AN EVIDENTIARY HEARING.

Petitioner further contends that the Federal Circuit Court failed to address this issue. Respondents submit that, by refuting the claim of vindictiveness, the Federal Circuit Court covered this issue. (See Petition for a Writ of Certiorari, at 18.) Petitioner further claims that vindictiveness led to the choice of charge against him. According to petitioner, the prosecutor's wrath led to an arbitrary and discriminatory charge selection. Because such a claim is totally unsupported by the record (see Petition for a Writ of Certiorari, at 18), respondents submit

that the charge selection was most appropriate.

Petitioner's conduct, as charged in the information, which used the relevant statutory language, fell within the general proscription of Ariz.Rev.Stat.Ann. § 13-320.01 (old criminal code). Thus, the choice of statute under which to proceed is a matter of prosecutorial discretion. See United States v. Brewer, 528 F.2d 492 (4th Cir. 1975). Since there was no showing of prosecutorial vindictiveness or class-based discrimination, the availability of other less severe charges does not invalidate the charge selected. See United States v. Brewer, supra. Analogous to this case is the fact that Mr. Brewer's mail fraud broke other less severe laws, but the prosecutor was free to pursue the mail fraud charge with its greater punishment.

Contrary to petitioner's view, his scheme was on a grandiose scale. The legislative history shows that the relevant statute was aimed at more than just land frauds. (The land fraud situation merely drove home the point that new legislation was needed.) The relevant statute was aimed at frauds of the nature of land frauds. Its scope is immense. See State v. Moses, 123 Ariz. 296, 298, 599 P.2d 252, 254 (Ct.App. 1979). Petitioner's scheme, with its type of misrepresentations, victims, and proceeds, fits the nature of frauds envisioned by Ariz.Rev.Stat.Ann. § 13-320.01 (old criminal code). The words "scheme or artiface to defraud" include a wide variety of plans. See United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976).

Although other charges could have been utilized, the one chosen by the prosecutor applied best of all. There was no arbitrary or discriminatory prosecution in this case. Still, there remains no reason to grant certiorari. Nor is there a reason to grant certiorari on the sub-issue raised in petitioner's third argument.

As a sub-issue, petitioner also claims that the Federal District Court erred by not conducting an evidentiary hearing on the issue of alleged vindictiveness by the prosecutor. This claim is premised upon petitioner's belief that an evidentiary hearing was needed to show this alleged fact: that the prosecutor was vindictive in his charge selection. Respondents posit that no evidentiary hearing was required where the record showed

absolutely no support for the bald-faced allegation. (See Petition for a Writ of Certiorari, at 18.)

While petitioner may claim prosecutorial vindictiveness, the record fails to even begin to suggest it. As such, it is respondents' position that the self-serving claim alone is insufficient to require an evidentiary hearing. See Clayton v. Estelle, supra.

ARGUMENT

IV

PETITIONER WAS NOT PROSECUTED UNDER A VAGUE STATUTE. THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

For his final claim, petitioner asserts that Ariz.Rev.Stat.Ann. § 13-320.01 (old criminal code) suffers from impermissible vaguenss due to its use of the verbiage "scheme or artifice to defraud." Since these words have passed

constitutional muster in the past, respondents take the position that petitioner's last argument, like the previous three, is without merit.

The test for vagueness is agreed upon -- the challenged statute will not be struck down for impermissible vagueness if it gives a person of ordinary intelligence fair notice of the proscribed conduct. The challenged words have some meaning on their face -- they devote a plan, device, or strategy calculated to defraud another. Moreover, the common definition has been refined through case law -- the challenged words denote a scheme or plan reasonably calculated to deceive a person of ordinary prudence and comprehension. See United States v. Netterville, 553 F.2d 903 (5th Cir. 1977). Thus, the challenged statute gave petitioner fair notice of the

proscribed conduct. See Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (judicial interpretation of a statute can give it the necessary specificity).

Since the challenged state statute is patterned after the federal mail fraud statute (18 U.S.C. § 1341), it is to be noted that the challenged words have passed constitutional muster on the federal level where those words were used in federal statutes. See United States v. Louderman, 576 F.2d 1383, 1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (no vagueness in the federal wire fraud statute); United States v. Feinberg, 535 F.2d 1004, 1010 (7th Cir.), cert. denied, 429 U.S. 929 (1976) (no vagueness in the federal mail fraud statute).

A couple of remaining points are necessary. Petitioner relies upon United States v. McNeive, supra. While that case is clearly distinguishable from the instant case, it does point out that courts have construed a wide variety of plans into a "scheme or artifice to defraud." Clearly, petitioner's plan is envisioned. There is no double jeopardy or punishment problem -- obviously, each separate fraudulent transaction leads to a separate count. Moreover, the scheme is in existence before the first victim is taken. If petitioner would have been caught and stopped after only one victim, then he still would have been privy to prosecution (one count of violating the challenged statute).

Since the challenged statute gave petitioner fair notice that his scheme was

a violation of law, Ariz.Rev.Stat.Ann. § 13-320.01 (old criminal code) does not suffer from impermissible vagueness; therefore, petitioner was not prosecuted under a vague statute. Again, there is no reason to grant certiorari.

CONCLUSION

Since the resolution of the issues presented by the instant writ conforms with the existing law of the land, there are no proper grounds for a grant of certiorari. For the foregoing reason, respondents request this Court's denial of the requested grant of certiorari.

Respectfully submitted this 19th day of March, 1980.

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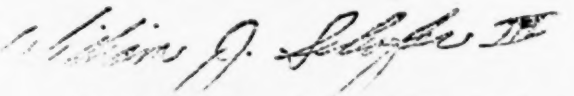

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